



Comptroller General  
of the United States

Washington, D.C. 20548

*McHuliffe*

## Decision

**Matter of:** Perkin-Elmer Corporation, Metco Division

**File:** B-237076

**Date:** December 28, 1989

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### DIGEST

The General Accounting Office will not consider a bid protest by a subcontractor concerning a subcontract award by a prime construction contractor where the government's involvement is not so pervasive that the prime contractor should be considered a mere conduit for the government.

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### DECISION

Perkin-Elmer Corporation, Metco Division (Metco) protests the award of a subcontract by Hensel Phelps Construction Company to Sulzer Plasma Technik, Inc. (SPT), for the construction of an automated plasma spray system under Hensel Phelps' contract No. DACA56-87-C-0002 with the Army Corps of Engineers to construct and equip a building with the machinery and systems necessary to repair jet engine turbine blades at Tinker Air Force Base, Oklahoma.

We dismiss the protest since this subcontractor protest is not for consideration under our Bid Protest Regulations, 4 C.F.R. § 21.3(m)(10) (1989).

Hensel Phelps was originally awarded the contract in 1986; the requirement for an automated plasma spray system (and three other systems not in question) was added by modification, with the Air Force providing Hensel Phelps with the technical specifications to be met by the plasma spray system. Hensel Phelps subsequently issued a request for technical and price proposals. Three offerors responded. After an initial review of the proposals, Hensel Phelps transmitted the proposals to the Corps of Engineers. The record indicates that at that time, Hensel Phelps had determined Metco's proposal, which offered the lowest price, to be acceptable and recommended Metco for award. The Corps removed all price information from the proposals and submitted them to the Air Force for technical review. Only Metco's and SPT's proposals were provided to the Air Force since the third proposal was considered by the Corps to be unreasonably priced. The Air Force found several technical

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deficiencies in the Metco proposal and notified Hensel Phelps of the need for clarifications. Hensel Phelps instructed Metco to submit the necessary clarifications and confirmed those clarifications by letter to Metco dated August 3, 1988. By letter of October 18, Hensel Phelps notified Metco that it was "selected to participate in [Hensel Phelps'] final approval process" which would include meeting with government technical personnel. A site visit of Metco's facilities was subsequently conducted solely by government personnel at Hensel Phelps' request. Although SPT's proposal was ultimately approved by the Air Force as technically acceptable, Metco's proposal was found to be noncompliant with the specifications. Hensel Phelps made award to SPT on September 15, 1989. Metco's protest followed.

Metco essentially contends that its offer should have been selected since it was technically acceptable and offered the lowest price. Metco also challenges the award to SPT on the basis that improper discussions with SPT caused SPT to reinstate an allegedly previously withdrawn proposal. Metco claims that its protest is appropriate for consideration under our Bid Protest Regulations, 4 C.F.R. Part 21, since the selection was actually made by the government.

The Corps asserts that Hensel Phelps' selection of SPT was proper and claims that Metco's protest should be dismissed since it is a subcontract protest over which our Office has no jurisdiction. We agree.

Under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551 et seq. (Supp. IV 1986), our Office has jurisdiction to decide protests involving contract solicitations and awards by federal agencies. We have interpreted this provision as authorizing us to decide protests of subcontract solicitations and awards only when the subcontract is "by or for the government." 4 C.F.R. § 21.3(m)(10).

Generally, a subcontract is considered to be "by or for the government" where the prime contractor principally provides large-scale management services to the government and, as a result, generally has on-going purchasing responsibility. In effect, the prime contractor acts as a middleman or a conduit between the government and the subcontractor. American Nuclear Corp., B-228028, Nov. 23, 1987, 87-2 CPD ¶ 503. Such circumstances may exist where the prime contractor operates and manages a government facility, Westinghouse Elec. Corp., B-227091, Aug. 10, 1987, 87-2 CPD ¶ 145, otherwise provides large-scale management services, Union Natural Gas Co., B-224607, Jan. 9, 1987, 87-1 CPD ¶ 44

or functions primarily to handle the administrative procedures of subcontracting with vendors actually selected by the agency. University of Mich., et al., 66 Comp. Gen. 538 (1987), 87-1 CPD ¶ 643. Except in these limited circumstances in which the prime contractor is basically acting as the government's agent, a subcontract awarded by a government contractor in the course of performing a prime contract generally is not considered "by or for the government." Barshfield, Inc., B-235575, July 11, 1989, 89-2 CPD ¶ 33.

Hensel Phelps' contract with the Corps calls for the construction of a large blade repair facility, but does not call for the firm to operate or maintain the facility. Since any construction management responsibilities in Hensel Phelps' contract are incidental to its primary function to build and equip the facility (which is to include the automated plasma spray system), we cannot find that the nature of Hensel Phelps' contract with the Corps is to provide the type of management services which would indicate that this subcontract procurement is "by or for the government." Metco, however, argues that the degree of control exercised by the Corps and the Air Force in this case made Hensel Phelps a "mere conduit" for the government's ultimate selection for award. In this regard, Metco first points out that Hensel Phelps had informed it that an award would be forthcoming if Metco's proposal was "selected" by the Air Force. Metco also states that since Hensel Phelps did not attend the government's site visit of Metco's facilities, and since Metco submitted samples (and SPT submitted its Buy American Act certification) directly to the government, the Air Force and the Corps were actively involved in an evaluation of proposals which effectively directed the subcontractor selection. To support its contentions, Metco cites our decision in University of Mich., et al., B-225756 et al., supra, wherein we found that a prime contractor was acting as a mere administrative conduit where the prime contract there required the contractor to subcontract with a firm selected by a government-controlled evaluation team, and the government directed the award decision.

In response to Metco's allegations, the Corps explains that Hensel Phelps' statement regarding the mentioned "selection" of a proposal by the Air Force was a careless and improper characterization by Hensel Phelps of the government's involvement in reviewing the proposals only for technical compliance (approval or disapproval) and that at no time did the contractual responsibilities for technical evaluation, scoring, ranking, and award shift to the government. As for the government's site visit of Metco's facilities and the

acceptance of offerors' submissions, the Corps explains that the government was at all times acting under the request, direction and acquiescence of Hensel Phelps. In this regard, the Corps reiterates that at no time during this procurement did the Corps or the Air Force evaluate the proposals for scoring or ranking purposes, but simply reviewed each proposal for technical compliance with the specifications.

We do not find that the government's involvement in this subcontractor procurement renders this case appropriate for consideration under our Bid Protest Regulations. Our Office will only assume jurisdiction where the government's involvement in the subcontractor selection is so pervasive that the contractor is a mere conduit for the government. Toxco, Inc., B-235562, Aug. 23, 1989, 68 Comp. Gen. \_\_\_, 89-2 CPD ¶ 170. The examples raised by the protester as instances of government involvement are all directly related to the Air Force's review of technical compliance and do not indicate that the Air Force did more than approve or disapprove the proposals after technical review. In this regard, even assuming the Air Force's conduct here in reviewing the proposals amounted to effectively directing the subcontractor selection, this alone does not indicate the prime contractor was acting "by or for the government," that is, as the government's agent for this procurement, which is the only basis upon which we will review the subcontract award. Toxco, Inc., B-235562, supra; Barshfield, Inc., B-235575, supra. In other words, even where there is active government involvement in the subcontracting process because of a particularly complex or potentially hazardous project, our Office does not consider such involvement a basis for invoking jurisdiction where that involvement falls short of rendering the prime contractor a mere conduit for the government. See, e.g., American Nuclear Corp., B-228028, supra.

The contested government actions here center upon the Air Force's review of the proposals for technical compliance and do not indicate that this procurement involves other than a subcontract awarded by a prime construction contractor (subject to government approval) in the course of performing its contract. We find that the government's basic involvement in the selection of the subcontractor here was to disapprove Hensel Phelps' selection of Metco because Metco's proposal failed to comply with material technical specifications. This is not enough for our Office to assume jurisdiction since the record simply does not support the view that agency effectively "took over" the procurement

from the prime contractor. See Barshfield, Inc., B-235575, supra; Edison Chouset Offshore, Inc., Polar Marine Partners, B-230121.2, B-230121.3, May 19, 1988, 88-1 CPD ¶ 477.

The protest is dismissed.

A handwritten signature in cursive script that reads "Ronald Berger".

Ronald Berger  
Associate General Counsel